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**ARBITRATION BETWEEN THE COUNTY OF MODOC AND UNITED
PUBLIC EMPLOYEES OF CALIFORNIA, LOCAL 792**

In re the matter of:

Mike Hudson,

Grievant,

vs.

County of Modoc,

Respondent.

) Case No.: ARB-04-2754

) **ARBITRATION DECISION**

) Date: May 18, 2005

INTRODUCTION

On March 1 and 2, 2005, the arbitration hearing in the above-entitled matter was conducted at the Modoc County Administration Office located at 114 East North Street, Alturas, California 96101. Present at the outset of the hearing were the grievant, Mike Hudson, his representatives Mike Lyon, Labor Representative, and Leland Dunlap, Labor Advocate, both with United Public Employees of California, Local 792. (Hereinafter designated UPE)

Present for the County of Modoc were representatives Rick Haeg and Randy Nickolaus with Nickolaus & Haeg consultants in labor relations and personnel management. Also present representing Modoc County was Phil Smith, Director of Modoc County Health Services.

Pursuant to a stipulation at the conclusion of the hearing the parties served post-hearing briefs simultaneously by United States Mail on April 6, 2005. Each party elected not to serve rebuttal briefs and so notified the Arbitrator by letters dated April 12, 2005 and April 13, 2005.

1 UPE submitted seven documents during the proceedings, marked U.1 through and
2 including U.7. The County submitted thirteen documents, marked Co. 1 through and including
3 Co. 13. The parties jointly submitted sixteen documents marked Jt. 1 through and including Jt.
4 16. At the conclusion of the hearing the Arbitrator admitted all the submitted documents into
evidence.

5 **STATEMENT OF THE ISSUE**

6 The parties agreed upon the following issue statement:

7 "Was Mike Hudson terminated for cause, if not what should the remedy be?" (Joint
8 Exhibit 16)

9 **FINDINGS OF FACT**

10 After reviewing the record, including all exhibits therein, the Arbitrator makes the
11 following findings of fact as to the matters relevant to the determination of the central issue: (I)
12 The events upon which the termination of employment was predicated, (II) Mr. Hudson's
13 physical limitations at hiring and during the course of his employment, (III) The essential
14 functions of the position for which Mr. Hudson was employed, (IV) The accommodations
15 provided by the Employer to Mr. Hudson during the course of his employment, (V) Other related
16 matters.

17 **I. THE EVENTS UPON WHICH GRIEVANT'S TERMINATION WAS PREDICATED**

18 Witness Tara Shepard, Grievant's immediate supervisor, testified that he was employed in
19 1999. (Tape 1, Side 1, footage 405-406.) Hereinafter, citations to the taped record will be
20 abbreviated, i. e. T1,1, 405-406) He served until his termination on March 31, 2004. (Jt. 12) Ms
21 Shepard testified that Mr. Hudson's initial evaluation of March 24, 2000 (Jt. 1) was completed
22 approximately seven months after his employment, during the probationary period of 12 months.
23 (T1,1, 410,422)

24 The evaluation of March 24, 2000, reflects two ratings of needs improvement; one in the
25 category of "organizing" and another in the category of "thoroughness". The comments section
26 of the evaluation, while commending Mr. Hudson for his initiative in designing a Day Treatment
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Program, states that improvement is needed in organizing a ". . . thorough, useable record-keeping system for the clients in Day Treatment. . ." (Jt. 1) His overall rating, however, was "Meets standards" (Ibid)

Mr. Hudson was next evaluated on August 29, 2000. (Jt. 2) He continued to receive needs improvement ratings in both organizing and thoroughness. The comments deal in the main with record-keeping issues. He was rated "Meets Standards" and granted his merit step pay increase. (Ibid)

Mr. Hudson was again evaluated on August 30, 2001. He was rated "Meets Standards" and granted a merit step pay increase. (Jt. 3) Ms Shepard testified further about comments on the evaluation that referred to a mini-grant, tobacco program. She stated that she had rated Mr. Hudson "Not acceptable" in reliability because he did not follow through on the tobacco program. (T1,1, 496-497) The comments section also made reference to the topic of record keeping and the need for additional improvement.

On September 23, 2002, Mr. Hudson was again evaluated. (Jt. 4) The initial date on the evaluation form is September 13, 2003; however, the words "Amended 9/23/02" are entered on the date line and bear the initials TS. Ms Shepard testified that when the evaluation was first presented, she had written some comments about chart reviews, that Mr. Hudson presented information in correction of those comments and that Ms Shepard, thus, revised the evaluation with the new date of September 23. (T1,1, 520-21) Mr. Hudson received an overall "Needs Improvement" rating and was denied a merit step pay increase. (T1,1, 558) The attachment to the evaluation bearing the date September 23, 2002 cites poor-record keeping.

Following the evaluation of September 23, 2002 Tara Shepard completed a chart review in preparation for a three month review of Grievant's performance. (T1,2 039) She testified that in a random fashion she selected a number of Grievant's case files from the files kept in a central location. (T1,2, 050)

Ms Shepard testified that the quantity of errors in the chart review dated December 20, 2002 was out of line with what might be considered an acceptable error rate. (T1,2, 117-122) She

testified that she believed the chart review had been the subject of a discussion between Grievant and her supervisor, Phil Smith. (T1,2, 124)

The County issued a Notice of Intent to Take Disciplinary Action dated December 27, 2002, citing two bases: (1) incompetence related to record-keeping deficiencies and (2) failure to maintain a minimum job requirement--possession of a valid California driver's license. (Co. 10) Phil Smith, Director of Health Services testified that no discipline emanated from the Notice since he had not followed the progressive disciplinary dictates of the MOU. (T1,2, 10) The driver's license issue was resolved; that is, the County agreed that Mr. Hudson could provide for his own transportation and that the County would give him early notice, if possible, of when he would need to be transported. (Ibid)

The County issued a letter of warning to Grievant dated January 16, 2003 which generally recounted employment history, record keeping deficiencies and efforts of the County to provide accommodations. Ms Shepard, thereafter completed a chart review dated January 23, 2003 citing continuing record-keeping problems. (Co. #2) On January 28, 2003, Grievant signed a survey document designed to determine training needs of staff relative to record keeping. (Co. #7) It is noted that of the 41 categories where employees were asked if they needed additional training, Grievant checked nine. The last page of the survey contained an open-ended question, "Do you have any other need for training/instruction in paperwork/documentation?, If yes, please specify." Grievant did not respond. Ms Shepard testified that Grievant's response to the survey was inconsistent with her overall knowledge of the deficiencies in his record-keeping. Ms. Shepard provided Grievant with another chart review dated February 18, 2003, (Co.# 3) and completed another dated March 13, 2003 (Co.#4) On March 17, 2003, Grievant was given notice of an intended three day suspension (Jt. #6) and on April 20, was suspended for three days. (Jt. 7) Subsequent chart reviews were dated April 26, 2003, (Co. #5) and May 29, 2003 (Co. #6) each of which enumerated Ms Shepard's findings of record-keeping errors. Ms Shepard testified that a document prepared in August, 2003 (Co. 8) set forth record-keeping standards and that these standards were discussed with all staff, including Grievant. (T1,2, 560-564) Follow-up training on the standards occurred on September 17, 2003 (T1,2, 574) On

September 30, 2003, Grievant received a "Not Acceptable" evaluation.(Jt. 8) On November 14, 2003 Grievant was given notice of intent to impose a ten day suspension (Co. 12) and was so suspended on January 27, 2004. (Jt. 9) Ms Shepard, pursuant to a representation at a hearing on January 26, 2004 by Grievant that his DUI charts were accurate, reviewed three of the total of 14 and produced a report dated February 26, 2004 setting forth her findings that there were still inaccuracies. (T2,1, 115-125) (Co.9) Grievant raised an objection to the introduction of Co. 9 stating that it had not been produced pursuant to a discovery request to the County. (See Jt. 15 and T2,1, 80-84) Shepard admitted that she did not give a copy of Co. 9 to Grievant (T2,1, 180-185) Shepard testified that the review of the DUI files occurred when Grievant was serving a ten day suspension. (T2,1, 185-190) Phil Smith, however testified that although he did not recall producing and giving a copy of Co. 9 to Grievant, he did meet with him upon Grievant's return from the ten day suspension and went over the contents of Co. 9 with Grievant. The Arbitrator is satisfied Grievant knew the contents of the document; that is, a review of three of his DUI files that he had represented were error free. Shepard testified that during the period of Grievant's ten day suspension, she received a complaint from one of Grievant's clients that a promised letter reflecting an assessment had not been sent to a nearby Superior Court. Shepard stated that the assessment had been performed on January 27, 2004 and that it would have taken approximately fifteen minutes to one-half hour to generate the letter. ((T2,1 240-280)

Grievant was given notice of intent to terminate by letter dated March 10, 2004 (Jt 10) and was terminated effective March 31, 2004 by letter dated March 30, 2004. (Jt. 12)

II. GRIEVANT'S PHYSICAL LIMITATIONS AT THE TIME OF INTERVIEW AND DURING THE COURSE OF HIS EMPLOYMENT

Tara Shepard testified that at a panel interview of Mr. Hudson to consider his application for employment that the panel was aware of his vision impairment. (T2,1, 564-600) Mr. Hudson testified that he has known since 1988 that his vision condition was serious. He stated that his driver's license had been suspended by the State because of his inability to see. He had been informed that the suspension was due to a deterioration in his vision which was confirmed by his

physician. He further stated that the condition, "macular degeneration is a progressive disease."
(T5,2, 460-505) Tara Shepard testified as to her recollection that Mr. Hudson's field of vision
was about six to eight inches. (T5,1 035-040) Mr. Hudson confirmed that vision was an issue.
(T7,1 500-519) He indicated that his field of vision was restricted, that he could not scan an
entire page and that this prompted requests for more time to complete record keeping
requirements. (T7,1 530-539) At this hearing, he was utilizing an optical device that he
described as a "bioptic telescope". He countered Shepard's prior testimony that his field of vision
was six to eight inches and stated that it was under certain scanning actions between the size of a
dime and a quarter. (T5,2 259-273) Shepard also testified that at the time of his employment
interview Grievant stated that he was "legally blind". (T5,1 460-465)

III. THE ESSENTIAL FUNCTIONS OF THE JOB

In answer to a direct question by the Arbitrator, Ms Shepard stated that the essential
functions of Grievant's position were generally to help people, but that as a government agency
they were required to keep accurate records; that there was a direct correlation between keeping
accurate records and providing effective counseling; that poor record keeping could also affect
agency funding. (T2,2, 000-028, T1,2 269-281)

She described in detail the kinds of data that were to be entered into department case
files: interview forms containing family history, personal history and medical data, attendance
sheets, individual case notes, group notes, various documents that were required by the State
including rights statements and a non-discrimination statement (T1,2 061-100).

Phil Smith testified that he had discussed the documentation requirements at the job
interview in 1999 and that Grievant's response was generally that the requirement was not a
problem. (T2,2 294-304)

IV. ACCOMMODATION EFFORTS

At the time of his initial evaluation in March, 2000, Mr. Hudson requested a software
program entitled Dragon or Dragon-speak which would permit him to speak words that would be
converted to text. The County purchased that software for him. (T1,1, 433-436)

1 Notwithstanding that during the course of his employment Grievant's drivers license was
2 suspended by the State of California because of his vision impairment, the County agreed that
3 Mr. Hudson could provide for his own transportation and the County would give him early
4 notice, if possible, of when he needed to be transported. (T1,2 010)

5 On or about the time of an August 29, 2000 evaluation, Tara Shepard decided that Mr.
6 Hudson should not carry an out-patient case load. (T1,1, 454) He was operating the Day
7 Treatment Program. Ms Shepard testified that the purpose of this alteration of his assignment
8 was to ease his case load and give him more time to deal with what she described as problems in
9 documentation. (T1,1, 466-468)

10 By memorandum of April 29, 2003 from Phil Smith, Grievant was offered
11 accommodation in the form of a ". . .larger monitor". (Co 13). Shepard stated that the larger
12 monitor was, in fact, provided. (T2,1 600-650) Additionally, Shepard testified that she honored
13 a request that Grievant be given more time to complete his assessment records. (Ibid) A 21"
14 monitor was provided to Grievant. (T6,1 68-208) Grievant testified that the County offered to
15 purchase a page magnifier for him. He stated that the magnifiers the County was considering
16 were too small--what he really needed was a large magnifier that could be placed over an open
17 book. However, he did not make his desires known and told the employer to buy one that he
18 privately knew was not what he needed. (Ibid)

19 Ms Shepard testified that at the time of Grievant's evaluation of September 23, 2002, Mr.
20 Hudson had a small case load and had more group assignments than other employees; that it was
21 easier to document group work and that in her opinion Mr. Hudson had enough time to complete
22 his record-keeping. (T1,1 540-549) She further testified that the County had taken on Drug
23 Court clients, whose cases had been taken by others in the Department. (T1,1, 550-554, 555-557)

24 Grievant testified that he would have opted to continue to do only group counseling. (T7,1 460-
25 469) He admitted that no other counselor in the department had only group therapy as an

1 assignment, but that everyone else had "combinations". [of individual cases and groups] (T7,1
2 475-479) The Arbitrator specifically recalls asking Tara Shepard why Grievant could not have
3 continued serving only as a group counselor. She replied that the record keeping burden on other
4 counselors would have become unmanageable. This position appears related to her testimony
5 that in order to reduce Grievant's case load at one point, others had had to take on new drug court
6 cases. ((T-1,1 550-554, 555-557)

7 After he was given notice of terminaion in March, 2004,
8 Grievant requested a software program entitled "Omni-form, pro 5", that ostensibly was designed
9 to alert a user when certain required document entries were missing. (T3,2 140-150) (T6,1 68-
10 208) There is no evidence in the record that such software was provided to Grievant.

11 **V. OTHER RELATED MATTERS**

12 Grievant raised the following defenses with respect to his termination: (1) That he was
13 terminated in retaliation for filing either or both a HIPAA and DFEH complaint, (2) That his
14 alleged record keeping deficiencies were no greater than others in his same job classification, (3)
15 He had no opportunity to remedy the last cited errors in certain DUI files prior to his termination
16 because he was ill and/or on suspension; that the review of his DUI files during his suspension
17 was a violation of a promise made to him on January 26, 2004 that his files would not reviewed
18 for another ninety days.

19 **(1) Hippa/DFEH matters.**

20 Phil Smith, was asked whether he knew in January, 2004 that Grievant had filed a
21 HIPAA complaint (Health Insurance Portability and Accessibility Act) He stated that he did not
22 then know, but knew later in September or October. He did inquire of Lynn Buffington,
23 assistant to the then County Administrative Officer who had filed the complaint. Buffington
24 refused to divulge the author of the complaint. Smith testified that thereafter he took corrective
25 action to prevent a future violation(s). (T4,1 330-400)

1 Lynn Buffington, administrative assistant to the County executive testified that although
2 she knew that Grievant had raised a complaint that the medical privacy act had been violated, did
3 not disclose his identity to Phil Smith, even though Mr. Smith had asked. (T4, 2 520-527) Mr.
4 Smith denied terminating Grievant because he was a "whistleblower".(Ibid)

5 Mr. Smith testified that he did not know of the DFEH complaint in June of 2003. (Ibid)
6 Tara Shepard testified that she did not know that Grievant had filed either a HIPAA complaint or
7 a DFEH complaint. (T5,1 460-465)

8 Grievant testified that after he filed his complaint with DFEH, he was notified by
9 telephone that it would not be pursued. (T7,1 055-081)

10 There is no credible evidence in the record that the termination of Grievant was
11 connected to either his HIPAA or his DFEH complaint.

12 **(2) Illness/suspension when DUI file errors discovered/the 90 day "promise".**

13 Jt. Exhibit 9 suspended Grievant for ten days effective February 16, 2004. (It appears
14 that February 15, a holiday, was included in the ten days of suspension.)Union #3, reflects that
15 during February,2004, Grievant was at the work site no more than one day. (February 3, 2004)
16 The remainder of the days other than the suspension were recorded as flex days or sick days. Ms
17 Shepard reviewed certain DUI files during this period and produced a report dated February 26,
18 2004, while Grievant was on suspension. (T2,1, 115-125) It is uncontroverted that the DUI file
19 errors were discovered while Grievant was absent most of February because of suspension, sick
20 leave and flex days off.

21 Grievant testified that he understood from Tara Shepard that no further file reviews
22 would take place until 90 days following a Skelly hearing on January 26, 2004 in which he
23 represented that his DUI files were in perfect order. (T6,1 291-330) His exact paraphrase of her
24 words were that "she had no plans to review my files for another ninety days." (Ibid)

25 **(3) Error rate no greater than in files of other Alcohol and Drug specialists.**

1 Juana Scherer, an Account Technician in Grievant's work unit expressed an opinion that
2 Grievant's files contained no more errors than the files maintained by others. However, she
3 stated that her primary duty with respect to the files was to insure that billing information was
4 correct, that it was not her assigned responsibility to point out other file errors, nor to enforce the
5 documentation standards. (Co. 8) She did testify that at some point Phil Smith asked her opinion
6 with respect to Grievant's files and that she opined that Grievant was improving. (T3,2, 320-606)

7 Sondra Tate, an Alcohol and Drug Specialist since July 2000, and Grievant's co-worker,
8 testified that she acquired about eight of Grievant's files when he was terminated and it was her
9 opinion that they contained no more errors than usual. (T3,2, 606-625, T4,1, 000-057)

10 It must be noted that the foregoing testimony is from co-workers, including a person who
11 was not in Grievant's job classification, neither of whom were in a supervisory capacity nor had
12 the responsibility to judge the sufficiency of Grievant's record keeping nor to make comparisons
13 of his record keeping to that of other Drug and Alcohol Specialists. Thus, the Arbitrator does not
14 find that Grievant's record keeping was improving, or that his records contained no more errors
15 than those of other specialists.

16 17 18 **OPINION**

19 Grievant, employed in August 1999 as a Drug and Alcohol Specialist was initially
20 evaluated in March, 2000. At that time, his immediate supervisor put him on notice that his
21 record-keeping was deficient. Subsequently, over a period of approximately four years, a series
22 of chart reviews and evaluations reflect Grievant's continuing problem with meeting his
23 employer's expectations with respect to maintaining the records required of the position. In
24 January, 2003, Grievant was surveyed with respect to record-keeping training needs. Grievant
25 signed off on the survey in which he was invited to respond to an open-ended question as to his

1 overall needs in record-keeping training. He did not respond. In August of 2003, the employer
2 published a set of specific standards governing its expectations in record-keeping and thereafter
3 in September provided training to the specialist staff, including Grievant.

4 Throughout his employment, after the initial evaluation of March, 2000, Grievant
5 received adequate notice of the record-keeping deficiencies, denial of a merit step pay increase,
6 warning letters and suspensions without pay for periods of three days and subsequently ten days
7 due to his failure to comply with the employers record-keeping standards.

8 In December, 2002, Grievant was given a notice of intent to terminate his services,
9 alleging record-keeping and the loss of his driver's license as the two bases. This notice was
10 withdrawn since it was inconsistent with the expectations of the MOU that employee discipline
11 be progressive.

12 The Arbitrator in viewing the entire record of evaluations, notices, and discipline
13 resulting in Grievant's termination effective March 31, 2004, concludes that the employer
14 properly carried out progressive discipline as it is contemplated by the parties.

15 A fundamental question in this matter remains as to whether there are substantial factors
16 in the record that mitigate against the Grievant's termination.

17 **(1) Vision impairment/accommodation**

18 When Grievant was employed it was clear to the employer that he had a vision problem.
19 Tara Shepard testified that Grievant informed the panel of his vision impairment and specifically
20 advised the panel that he was "legally blind". There is no question that the vision problem was
21 severe. Grievant testified that his field of vision during certain tasks was between the size of a
22 dime and a quarter. He utilized a bioptic telescope to enable him to see within this field of
23 vision.

24 The essential functions of the position that Grievant occupied included substantial record-
25 keeping. The record-keeping was not a collateral duty, but intrinsic to an effective client-

1 counselor relationship and an important factor in the continuing funding of programs. That the
2 record-keeping was an essential function of the job is buttressed by Phil Smith's testimony that at
3 the interview he specifically mentioned record-keeping and that Grievant indicated that the
4 requirement was no problem.

5 It became evident within the first seven months of the position that notwithstanding
6 Grievant's good faith belief that he could meet expectations with respect to record-keeping, he
7 was not doing so. An immediate nexus arose between his vision impairment and his record-
8 keeping difficulties since the employer purchased the Dragon/Dragon-Speak software to
9 accommodate what the Arbitrator concludes was a recognition by both employer and employee
10 that his ability to do the record-keeping was impacted by his vision impairment.

11 The employer from March 2000 until Grievant's termination in March, 2004, engaged in
12 a pattern of accommodation to effect Grievant's ability to meet record-keeping standards. In
13 addition to the Dragon software, the employer purchased a 21" computer monitor, reduced
14 Grievant's case-load to give him more time to complete and/or correct records. It is of some
15 significance that when the employer offered to obtain a page magnifier for the Grievant, he did
16 not make his needs known, and simply permitted the employer to purchase a magnifier that he
17 knew was not an adequate accommodation for his vision needs.

18 While Grievant testified that after he received notice of the intent to terminate him, he
19 requested another software program, there is no showing that such software would have resulted
20 in rectification of the record-keeping deficiencies. Moreover, Grievant, on notice of his record-
21 keeping problems from March 2000, had the opportunity for approximately four years to
22 investigate visual accommodation products and so advise the employer.

23 State and Federal statutes require only that accommodation be reasonable--employers are
24 not required to provide accommodations that create undue hardship. Grievant did pose that if
25 given the option, he would have preferred to do group counseling only. The employer stated that

1 such an option was untenable, since the record-keeping burden on other counselors would have
2 become unmanageable. The employer is not required to strip a job of its usual and customary
3 duties as an accommodation, since those functions removed must be shifted to others in the
4 work-force. The maintenance of a "group-counseling only" position for the Grievant would have
5 been an undue hardship for the employer.

6 The Arbitrator concludes that (1) Grievant had a substantial physical impairment that
7 negatively affected his ability to perform the required record-keeping of the position. (2) That the
8 record-keeping was an essential functions of the job, (3) That the employer provided reasonable
9 accommodation to the Grievant.

10 **(2) Retaliation**

11 Grievant argued that he was terminated in retaliation for filing either a HIPAA or DFEH
12 complaint or both. There is no credible evidence in the record to support his allegation.

13 **(3) Record-keeping no worse than others**

14 Grievant argued that his record-keeping deficiencies were no greater than those of other
15 specialists and that at one point he was improving in that area. Grievant relies on the testimony
16 of his co-workers; however, neither was in a supervisory position to Grievant, nor charged by
17 the employer with the responsibility to make an assessment of his record-keeping abilities.
18 Moreover, there was no other comparative evidence in the record to support the contention that
19 Grievant's record-keeping performance was no worse than others.

20 **(4) The 90 day "promise"**

21 Grievant argued that he was not accorded an opportunity to correct the last noted errors in
22 his DUI files in February, 2004.

23 It is true that he was absent during the time that the DUI files were reviewed and errors recorded.
24 He purports a promise made on January 26, 2004 that no review of his files would occur for
25 another ninety days. According to Grievant, however, Ms Shepard simply indicated that she had

1 no plans to review files. Such an expression is precatory and cannot be construed as a
2 relinquishment of her obligation to review the work of those under her supervision at any time.

3 **DECISION**

4 Mike Hudson was terminated for cause.

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7 **THOMAS L. HODGES** **DATE**

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